No. 20,188

United States Court of Appeals

For the Ninth Circuit

VEIGH CUMMINGS,

Appellant,

vs.

LARRY R. BULLOCK and ARELETA BULLOCK, his wife,

Appellees.

BRIEF OF APPELLEES

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STATEMENT OF THE CASE

1. Introduction

This is a suit brought by Appellant for a decree of specific performance to compel Appellees to sell to Appellant certain real property situated in the State of Wyoming, under the terms of a written Lease containing an Option to Purchase.

Appellant appeals from the judgment entered on the 12th day of March, 1965, by the Honorable Sherrill Halbert, Judge of the United States District Court for the Northern District of California, Northern Division, decreeing that Appellant take nothing by reason of his Complaint.

2. The Facts of This Case

On September 2, 1958, Appellees and Appellant entered into a written agreement entitled Lease With

Option to Purchase (P's Ex. 1), hereinafter referred to as Lease, under the terms of which Appellees leased to Appellant certain real property situated in the State of Wyoming.

Paragraphs 4 and 5 of said Lease, provide as follows:

> "4. Lessee is granted an Option to Purchase the aforesaid described premises for the sum of $40,000.00, said Option to be exercised on or before the 1st day of December, 1960, *by payment to Lessors* of the sum of $4,000.00 which said $4,000.00 shall be applied on the purchase price of $40,000.00." (Emphasis ours.)
>
> "5. If Lessee shall exercise his Option to Purchase the leased premises, *then and in that event* Lessors *agree to sign* an agreement of sale *in accordance* with the Uniform Real Estate Contract attached to this Lease and Option, which said Uniform Real Estate Contract shall embody the terms of sale which shall govern between Lessors and Lessee *if and when Lessee exercises his option to purchase.*" (Emphasis ours.)

Paragraph 3 of said Uniform Real Estate Contract, which was attached to said Lease, bearing the date of December 1, 1960, and which was not signed by either of the parties, provided as follows:

> "3. Said Buyer hereby agrees to enter into possession and pay for said described premises the sum of Forty Thousand and no/100.....Dollars ($40,000.00) payable at the office of Seller, his assigns or order, First National Bank, Evanston, Wyoming strictly within the following times: Four Thousand and no/100.....($4,000.00) cash,

> *the receipt of which is hereby acknowledged,* and the balance of $36,000.00 shall be paid as follows: $4,000.00 on the 1st day of December, 1961, and a like sum on the 1st day of December each year thereafter until the balance owing is paid in full" (Emphasis ours.)

On February 1, 1960, Appellant entered into a contract, together with his wife, under the terms of which they sold the subject property to Arthur Evans, Hazel Evans, Alma Evans, and Carma Evans for the sum of $75,000.00. (Ds' Ex. C.)

On July 27, 1960, Appellant's then attorney, Dwight L. King, sent to Appellees a letter (P's Ex. 3) in which Mr. King stated that he had received notice from Appellant that Appellant *was planning* on exercising said Option to Purchase. Mr. King further stated that *as soon as the Warranty Deed and the Uniform Real Estate Contract are placed in the bank,* Appellant informed Mr. King that Appellant *would be able* to pay the Option payment of $4,000.00 which was due on the 1st day of December, 1960.

In September, 1960, Appellees moved from their residence at 3139 Walnut Avenue, Carmichael, California, to their new home situated at 6201 Westbrook Drive, Citrus Heights, California. Appellant was notified of said change of address by a letter from Appellees dated October 1, 1960 (P's Ex. 5), as was Appellant's attorney, Mr. King. (RT 18, 21, 58-59.)

Mr. King testified that by letter dated November 28, 1960, which Appellees have stipulated was received by the addressee on November 30, 1960, he forwarded to

the said First National Bank of Evanston, Wyoming, a certified check in the sum of $4,000.00 payable to Appellees, together with a Deed and copy of the said Uniform Real Estate Contract, with instructions that *after* Appellees had executed said Deed and Uniform Real Estate Contract, said bank was authorized to deliver said check to Appellees.

On November 29, 1960 (RT 74), Mr. King sent a letter dated November 28, 1960 (P's Ex. 6), addressed to Appellees, at the latter's former address in Carmichael, California (RT 74), which letter was not received by the Appellee, Areleta Bullock, until December 5, 1960. (Ds' Ex. D; RT 72-73.) In said letter (P's Ex. 6), Mr. King enclosed a Uniform Real Estate Contract covering the sale of said ranch (Ds' Ex. A), together with a Deed of said property, in which Deed Appellant's wife, Jo Ellen Cummings, was named as a Grantee with Appellant (Ds' Ex. B). Mr. King further stated in said letter that Appellant had placed in Mr. King's hands, a Cashier's Check (*the amount of which was not stated in said letter*), and which check had been forwarded by Mr. King to the First National Bank of Evanston, Wyoming, with instructions to the bank that it was to forward said check to Appellees upon receipt from Appellees of said Uniform Real Estate Contract and Deed properly executed by Appellees.

Mrs. Bullock testified that when she received said letter (P's Ex. 6), that she did not open the same (RT 75-76), but forwarded it directly to Mr. P. W. Spauld-

ing, who was Appellees' attorney in Wyoming, which letter was received by Mr. Spaulding on December 7, 1960. (Ds' Ex. E.) Mr. Bullock was in Wyoming at that time, and accompanied by Mr. Spaulding (RT 30) the two of them went to said bank where Mr. Bullock requested that the bank pay him said sum of $4,000.00, but the bank refused, stating that its instructions were that it was not to pay said sum of money to Mr. Bullock unless and until the Appellee first executed the said Uniform Real Estate Contract and Deed which had been mailed to Appellees by Mr. King in Mr. King's letter of November 28, 1960 (RT 25-26, 30.)

Mr. Bullock's testimony, which was not disputed by Appellant, was that at the time the Lease was executed the manner in which the Option to Purchase was to be exercised was discussed with Appellant, it being stated that Appellees would not execute any documents until they had first received the sum of $4,000.00. (RT 33.) Mr. Bullock's uncontradicted testimony was that it was his understanding (Paragraph 4 of the Lease) that the sum of $4,000.00 was to be paid directly to Appellees before they executed any documents. (RT 36, 38.)

Based on the foregoing, and the fact that Mr. Bullock had not received the sum of $4,000.00 (RT 25), Mr. Bullock, on the advice of his counsel (RT 26), refused to sign either the Uniform Real Estate Contract or the Warranty Deed proffered to him by the bank. (RT 26, 31.)

Said Warranty Deed (Ds' Ex. B) which Mr. Bullock was required to execute before being paid the sum of $4,000.00, contained the additional name of Appellant's wife, as Grantee, with whom Appellees never had any dealings (RT 25-26), and who was not a party to either the Lease or the aforementioned Uniform Real Estate Contract that was presented to Mr. Bullock by the bank for signature.

Appellant confirmed Mr. Bullock's testimony that at no time either prior to or subsequent to December 1, 1960, had he mailed directly to Appellees, the sum of $4,000.00. (RT 26, 51.)

The District Court found that under the terms of said Lease, the unconditional payment by Appellant to Appellees of the sum of $4,000.00 not later than December 1, 1960, was a condition precedent to any obligation on the part of Appellees to execute said Uniform Real Estate Contract and Warranty Deed, and by reason of Appellant's failure to exercise the Option to Purchase, in accordance with the terms of said Lease, Appellees have no obligation to sell said real property to Appellant.

QUESTIONS PRESENTED

I. Whether the District Court erred in its interpretation of the Lease with Option to Purchase and Uniform Real Estate Contract in determining that Appellant could exercise the Option to Purchase only by unconditionally delivering to Appellees the sum of

$4,000.00 on or before December 1, 1960, and that Appellant did not properly exercise said Option to Purchase.

II. Whether the District Court properly concluded that Appellant was not entitled to a Decree for Specific Performance.

III. Whether the District Court properly concluded that Appellant was not entitled to attorney's fees.

ARGUMENT

I. THE DISTRICT COURT DID NOT ERR IN ITS INTERPRETATION OF THE LEASE WITH OPTION TO PURCHASE AND UNIFORM REAL ESTATE CONTRACT IN DETERMINING THAT APPELLANT COULD EXERCISE THE OPTION TO PURCHASE ONLY BY UNCONDITIONALLY DELIVERING TO APPELLEES THE SUM OF $4,000.00 ON OR BEFORE DECEMBER 1, 1960, AND THAT APPELLANT DID NOT PROPERLY EXERCISE SAID OPTION TO PURCHASE.

Preliminarily, it is to be noted that inasmuch as the subject Lease was executed in the State of Utah, and relates to real property situated in the State of Wyoming, and the trial of this matter occurred in the State of California, the subject of conflicts of law arises. In order to answer the questions here presented, the substantive law of the State of California must be looked to (*Erie Railroad Company v. Tompkins,* 304 U.S. 64) including the applicable California choice of law rules. (*Klaxon Co. v. Stentor Mfg. Co.,* 313 U.S. 487.) Under California law, questions affecting the title to real property are determined by the lex loci rei sitae. (*Lawson v. Blodgett,* 1 C.A. 13; *In*

Re Patmore's Estate, 141 C.A.2d 416.) Where there is no statute or case law covering a case in which the law of another state should apply, then the Courts of California will assume that the law of such other state is not out of harmony with that of California, and the Court will look to California law for its solution of the problem. (*Gagnon Co. Inc. v. Nevada Desert Inn,* 45 Cal.2d 448, 454; *Aldabe v. Aldabe,* 209 C.A.2d 453, 471.)

No Wyoming law relative to the issues of this case have been found which are incompatible with California law, and accordingly it will be assumed that the applicable substantive law is in agreement with that of California. (*Wells v. Wells,* 74 C.A.2d 449.)

As previously stated, Mr. Bullock testified that he did not execute the Uniform Real Estate Contract and Warranty Deed presented to him by the bank in Wyoming subsequent to December 1, 1960, for the reason that neither he nor his wife had ever been paid the sim of $4,000.00. In addition, said Deed contained the name of Appellant's wife as an additional Grantee, which addition had never been authorized by Appellees.

The law of Wyoming is that Options to Purchase are to be strictly construed, and where an option is to be exercised within a stated time and in a particular manner, that must be done exactly as prescribed. (*Covey v. Coveys Little America Inc.,* 378 P.2d 506.) It seems perfectly clear from a reading of the hereinbefore quoted provisions of Paragraph 4 of the subject Lease (P's Ex. 1), that the parties specifically con-

tracted as to the manner in which Appellant was to exercise said Option to Purchase, namely, "by payment *to Lessors* on or before December 1, 1960, of the sum of $4,000.00."

In Paragraph 5 of said Lease, Appellees agreed that *if,* Appellant exercised his Option to Purchase the leased premises, *then and in that event,* Appellees agreed to sign an Agreement of Sale *in accordance with* the Uniform Real Estate Contract attached to the Lease, which Uniform Real Estate Contract shall embody the terms of sale which shall govern between Appellant and Appellees, *if and when Appellant exercised his Option to Purchase.*

The law is clear that the act or acts which constitute the acceptance of an offer tendered in an option agreement are determined by the terms of the contract itself, and where the acceptance, or the election, or the exercise of the option is by the terms of the contract to be made in a particular manner, it must be strictly so made in order to constitute a valid acceptance. (*Calliach v. Farnham,* 83 C.A.2d 427, 430.)

Section 1436 of the *California Civil Code* defines a condition precedent as one which is to be performed before some right dependent thereon accrues, or some act dependent thereon is performed.

In Section 1439 of the *California Civil Code,* it is stated in part that before any party to an obligation can require another party to perform any act under it, *he must fulfill all conditions precedent thereto imposed upon himself* . . . (Italics ours.)

That payment to Appellees by Appellant of said sum of $4,000.00 was a condition precedent to Appellees being required to execute the documents described in said Lease, seems so obvious as to require no further discussion.

Even though not expressly stated in said Lease, the law is that time is of the essence of an Option to Purchase within a specified time, even though not expressly so made by the contract. (*Rosenaur v. Pacelli,* 174 C.A.2d 673, 677.) In this regard, the evidence is uncontradicted that Appellant did not pay to Appellees the said sum of $4,000.00 on or before December 1, 1960.

Appellant's contention that he properly exercised the Option to Purchase by depositing said sum of $4,000.00 in the bank in Wyoming, and was justified in requiring Appellees to execute the Uniform Contract of Sale and Warranty Deed before Appellees were entitled to receive said sum of $4,000.00 is completely untenable. In this regard, Paragraph 5 of the Lease states that if Appellant exercises his Option to Purchase, Appellees then agree to sign an Agreement of Sale *in accordance with* the Uniform Real Estate Contract attached to the Lease. Suffice to say that, at the time of the execution of the Lease, said Uniform Real Estate Contract was not signed by any of the parties, but was simply attached to the Lease as an exhibit of the form of Contract of Sale to be executed by the parties if and when Appellant exercised his Option to Purchase.

Moreover, in Paragraph 3 of said Uniform Real Estate Contract, it states that Appellees acknowledged receipt of the sum of $4,000.00 in cash, hence clearly envisioning the fact that said sum of $4,000.00 was to have been paid to Appellees on or before December 1, 1960, pursuant to the terms of the Option to Purchase contained in said Lease, and only the remaining balance of $36,000.00 was to be paid in said bank.

Moreover, nowhere, neither in the Lease nor in the Uniform Real Estate Contract is any provision made for an escrow arrangement with respect to the execution of the Uniform Real Estate Contract and the payment of the first $4,000.00. Payment under the escrow conditions set up by the Appellant, was neither to Appellees nor to the bank as the agent of Appellees, but rather to the bank as an agent of Appellant.

The Lease clearly contemplates that payment of the $4,000.00 directly to Appellees was a condition precedent to Appellees' obligation to execute the Uniform Real Estate Contract. There was no provision contained in said Lease, that Appellant's payment of said sum of $4,000.00 to Appellees could be made conditional upon Appellees executing said Real Estate Contract and said Warranty Deed.

The only document that can govern the conditions for the exercise of the subject Option to Purchase is the Lease, which document is the only agreement that contains the terms of the Option and the manner of its performance, and is the only document ever executed by all of the parties.

The deposit by Appellant's attorney of said sum of $4,000.00 in said bank is of no force or effect for the further reason that an offer to pay extinguishes an obligation only if the amount is deposited in a bank in the name of the creditor, *unconditionally, and in such manner that it at once becomes the creditor's property.* (*Righetti v. Righetti,* 5 C.A. 249, 251; *Verdier v. Verdier,* 133 C.A.2d 325, 333.) Admittedly, said deposit was not made unconditionally, but rather subject to Appellees first executing the Uniform Real Estate Contract as well as a Warranty Deed containing, as hereinbefore mentioned, the additional name of Mrs. Cummings as a Grantee, to which Appellees had never agreed.

The case of *Bourdieu v. Baker,* 6 C.A.2d 150, is almost identical with the within action. In that case the plaintiff granted the defendant an Option to Purchase certain real property, under the terms of which the price for the property was $25,000.00, and to be paid as follows: "$3,000.00—on or before 30 days from date hereof, the balance to be paid on or before 6 months from date hereof, or purchaser to assume mortgage of $22,000.00—and clear other property also included in said mortgage." Within the stated time, the defendant caused the sum of $3,000.00 to be placed with a bank with instructions to deliver the same to plaintiff, conditioned upon plaintiff, amongst other things, first executing a Deed of the property to defendant. The Court held that the defendant did not comply with the terms of the Option in that the Option did not require the plaintiff to first

execute a Deed for said premises to defendant before being entitled to receive said sum of $3,000.00. The Court states on page 158 of the Opinion that the acceptance of such an offer must be unconditional, must be in accordance with the terms of the offer, and an acceptance based upon terms varying from those offered constitute a rejection of the offer. On page 161 of the Opinion, the Court held that the deposit of said sum of money to be paid to the plaintiff only on unauthorized conditions, did not comply with the terms of the Option Agreement, and was not a sufficient tender or offer of performance. (See also *Fabares v. Benjamin,* 180 C.A.2d 264.)

Appellant claims as being exactly in point and in his favor, the case of *Merrion et al. v. Scorup-Somerville Cattle Co. et al.,* 134 F.2d 473. With this claim, Appellees cannot agree.

The *Merrion* case is clearly distinguishable from the within action, in there the Court simply held that the Optionee's demand that payment would not be made pursuant to the exercise of the Option to Purchase until receipt from the Optionor of the properly executed documents of conveyance was not objectional, as the Optionee was not simply tendering the first payment called for by the Optionee, but rather the full purchase price. Hence while the exercise of the Option to Purchase was conditional, such condition was permissible because when the Optionee tenders the entire purchase price, he is entitled to demand proper conveyance of the assets which he is paid.

Appellant next cites the case of *Grey v. Nickey Bros., Inc.,* 271 Fed. 249, as standing for the proposition that the exercise of an option does not become conditional by reason of the option holder demanding a deed. A reading of that case, shows that the Court made no such general statement, but rather that such statement was limited to the specific facts of the case.

In *Grey v. Nickey Bros., Inc.,* supra, the facts show that an Option to Purchase was given to be exercised within 30 days; that upon exercise of the option within the time specified, the Optionee was to pay to the Optionor the sum of $20,000.00 on account of the purchase price of $50,600.00 *upon the delivery to Optionee of a valid fee simple deed with full covenants of warranty, conveying an absolutely unencumbered fee simple title.* The Court there held that the express terms of the Option to Purchase unmistakably required, as a condition precedent to Optionee having to pay the sum of $20,000.00, the delivery by Optionor to Optionee of said deed.

Inasmuch as Paragraphs 4 and 5 of said Lease (P's Ex. 1) expressly prescribed that if Appellant desired to exercise said Option to Purchase, he was to do so by payment to Appellees of the sum of $4,000.00 on or before December 1, 1960, and that Appellees had no obligation to sign a Uniform Real Estate Contract or Deed unless and until Appellant exercised said Option in the aforementioned manner, it is submitted that in view of Appellant's *conditional* deposit of said sum of $4,000.00 in said bank, which was to be paid to

Appellees only after Appellees had executed the Uniform Real Estate Contract and Deed in a form never authorized, Appellant failed to exercise said Option in accordance with its terms.

As stated in *Briles v. Paulson,* 170 Cal. 196, 198-199:

> "The defendant did not convert the option into an agreement of sale, binding upon the plaintiff, except by complying with the conditions upon which the plaintiff had agreed to sell. Acceptance must be made and conditions performed within the time, if any, limited by the option, in order to constitute a contract of sale, time being of the essence in such contracts. A Court of Equity would not be justified in relieving a party from the effect of his failure to comply with the conditions on which he had been granted the privilege of buying. This would be making a new contract for the parties, and compelling the owner to sell when he had not agreed to do so. The assent or act of acceptance . . . whether by payment or the fulfillment of some other condition, was necessarily to be made within the time limited; otherwise, no contract could be consummated."

II. THE DISTRICT COURT PROPERLY CONCLUDED THAT APPELLANT WAS NOT ENTITLED TO A DECREE FOR SPECIFIC PERFORMANCE.

An additional and cogent reason for denial to Appellant of a Decree of Specific Performance is that Appellant has failed to allege and prove adequacy of consideration and that the agreement is not as to the Appellees unconscionable or inequitable.

The long-established uninterrupted rule of law in the State of California is that in an action for specific performance, plaintiff must allege in the complaint and prove at the trial that the contract is supported by adequate consideration and is just and reasonable as to the party against whom specific performance is sought. (*Civil Code,* Section 3391, Sub-Paragraphs 1 and 2; *Milton Kauffman Inc. v. Smith,* 82 C.A.2d 302, 304-305; *Mayers v. Alexander,* 73 C.A. 2d 752, 760; and cases listed in Volume 21B McKinney's New California Digest, *"Specific Performance"* Sections 116 and 117.)

Appellant failed to allege and prove adequacy of consideration and that to enforce said Option to Purchase would be fair and just to Appellees. It should of course be noted that Appellant a little over a year subsequent to the execution of said Lease had sold the subject property for the sum of $75,000.00, $35,000.00 in excess of what he had agreed to pay for the same.

By reason of the premises, it is submitted that Appellant should be denied specific performance.

III. THE DISTRICT COURT PROPERLY CONCLUDED THAT APPELLANT WAS NOT ENTITLED TO ATTORNEY'S FEES.

Appellees have found no Wyoming authorities concerning the allowance of attorney's fees.

The rule in California is that attorney's fees are not recoverable by a successful party in an action either at law or in equity, except in enumerated in-

stances where they are expressly allowed by statute. (*Miller v. Kehoe,* 107 Cal. 340; *Code of Civil Procedure,* Section 1021.)

In the instant case, Appellant requests attorney's fees on the ground that Paragraph 21 of the Uniform Real Estate Contract that was attached to the Lease, provided that if either Buyer or Seller defaulted in any of the covenants or agreements contained in the *Uniform Real Estate Contract,* the defaulting party should pay a reasonable attorney's fee which might arise or accrue from enforcing this agreement (Uniform Real Estate Contract), when obtaining possession of the premises covered by said Contract.

The answer to this contention of Appellant is that said Uniform Real Estate Contract was never executed by Appellees, and under the above authorities, could not possibly furnish the basis for an allowance of attorney's fees. It must be remembered that the only document executed by the parties, was the Lease, and said document had no provision whatsoever for attorney's fees.

In addition, Appellant has no basis for recovering attorney's fees due to the fact that Appellant failed to exercise said Option to Purchase and is not entitled to a Decree for Specific Performance.

CONCLUSION

For the reasons stated, it is respectfully submitted that the Judgment in this matter heretofore made on the 12th day of March, 1965, be affirmed.

Dated, Sacramento, California,
November 19, 1965.

Respectfully submitted,
HOWARD A. POTTS,
Attorney for Appellees.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

HOWARD A. POTTS,
Attorney for Appellees.